Supreme Court, U.S.
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No. 91-1483

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF IDAHO,
Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY,
Respondent,

PUBLIC SERVICE COMPANY OF COLORADO,
Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTERVENOR BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID W. KERBER *
KELLY, STANSFIELD & O'DONNELL
1225 17th Street, Suite 2600
Denver, CO 80202-5591
(303) 295-2500

JAMES R. MCCOTTER
General Counsel
PUBLIC SERVICE COMPANY
OF COLORADO
P.O. Box 840
Denver, CO 80201-0840
(303) 294-8500

Attorneys for Intervenor, Public Service Company of Colorado

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Does the Nuclear Waste Policy Act of 1983, 42 U.S.C. §§ 10101 *et seq.*, apply to the 1965 Research and Development Contract, as amended, between Public Service Company of Colorado and the Department of Energy?

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This Brief is submitted in opposition to the State of Idaho's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

STATEMENT

This case concerns the applicability of the Nuclear Waste Policy Act, 42 U.S.C. §§ 10101, *et seq.*, to the 1965 contract, as amended, between Public Service Company of Colorado (Public Service) and the Atomic Energy Commission as modified in 1980, which required the Atomic Energy Commission and its successor, the Department of Energy (DOE), to accept the spent nuclear fuel generated from the Public Service Company Fort

St. Vrain Nuclear Power Plant. This is but one round in a continuing effort by the Governor of Idaho to prevent the Department of Energy from fulfilling its contractual obligation to accept the Fort St. Vrain spent nuclear fuel at DOE's Idaho National Engineering Laboratory (INEL).[1]

In 1965, Public Service entered into a research and development contract with the Atomic Energy Commission, providing for the construction of an experimental High Temperature Gas-Cooled Reactor nuclear generation facility, which ultimately became the Public Service Company Fort St. Vrain (FSV) Nuclear Power Plant. Pet. App. 2. This contract was entered into pursuant to the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 *et seq.*, and Section 107 of Public Law 89-32, 79 Stat. 120, 122 (1965). The FSV reactor, built pursuant to this agree-

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[1] Initially, Cecil D. Andrus, the Governor of Idaho, threatened to call out the state police to block the Public Service shipments. After he notified Public Service of his intentions, Public Service and the DOE filed suit to obtain injunctive relief to enjoin these unconstitutional acts. In response to this claim, Idaho filed a counterclaim against the DOE, claiming that the DOE violated the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, by accepting the fuel. (*Public Service Company of Colorado v. Cecil D. Andrus* and *United States of America v. Cecil D. Andrus and the State of Idaho*, D. Idaho, Civil Action No. 91-0035 S HLR, consolidated with Civil Action No. 91-0054 S HLR.) On May 7, 1991, the District Court declared that the Governor's actions were unconstitutional and entered an injunction permanently enjoining him from interfering with the Fort St. Vrain shipments. This decision was not appealed. Within two weeks of learning of the Ninth Circuit's decision in this case, Idaho filed a lawsuit against DOE claiming, this time, that DOE needed an air permit before it could begin receiving shipments from Public Service. *Idaho Department of Health and Welfare v. United States Department of Energy, et al.*, CV-91-0423-EJL (D. Idaho). After the district court granted a preliminary injunction against DOE, on March 23, 1992, the Ninth Circuit reversed that decision in *Idaho Department of Health and Welfare v. United States Department of Energy*, No. 91-36207 (March 23, 1992 9th Cir.), thereby clearing the way for shipments.

ment, was to be a prototype for potential use in the development of nuclear power for this country. It was the first reactor of its type to store fuel in a dry atmosphere rather than under water.

In 1975, DOE completed construction at the Idaho National Engineering Laboratory (INEL) in Idaho for a dry storage concrete building designed specifically to receive and store the irradiated spent fuel from the prototype reactor at Fort St. Vrain. This building is the Irradiated Fuel Storage Facility. Pet. App. 3.

In April 1980, the DOE and Public Service entered into two separate agreements modifying and implementing the 1965 Agreement. These agreements required Public Service to deliver, and the DOE to receive, the FSV spent nuclear fuel at the Irradiated Fuel Storage Facility in Idaho. In these agreements, the DOE agreed to accept eight segments of the FSV spent nuclear fuel (*Id.*).[2]

In 1980, 1982 and 1984 through 1986, Public Service, having complied with all Nuclear Regulatory Commission and Department of Transportation regulations concerning the safe transportation of nuclear material, made approximately 123 shipments of spent nuclear fuel from the FSV Nuclear Plant to the Irradiated Fuel Storage Facility in Idaho.[3] Idaho neither prohibited nor inter-

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[2] Idaho's characterization of the agreement between Public Service Company and the Department of Energy as expiring (Pet. 5, 20 n.10) is in error. At the time the parties executed the amendment in 1980, they were aware that the eight segments of special nuclear fuel could not be delivered until 1989 at the earliest, since the plant had a Nuclear Regulatory Commission power restriction of 70%. Therefore, the intent and commtiment of the parties were for the Department of Energy to take the eight segments regardless of the time frame. This was the conclusion of the Ninth Circuit below. Pet. App. 4, 10. Idaho does not challenge the factual predicate upon which the Ninth Circuit based its decision.

[3] Idaho presents certain allegations concerning potential health hazards which could easily be misunderstood to refer to the spent

fered with these shipments, nor did it claim that the storage of these shipments violated the Nuclear Waste Policy Act. These shipments were transported across the highways of Idaho and were received by the DOE without incident.

On August 19, 1989, Public Service determined to permanently close the FSV Nuclear Power Plant. Pursuant to the 1965 contract, as amended, and the 1980 contract, the DOE prepared its facilities for receipt of the remainder of the spent fuel. A mutually agreed to shipping date was set and in early February 1991, an official from the DOE informed Public Service that the Irradiated Fuel Storage Facility was ready to receive the shipments of the remaining spent nuclear fuel segments from Fort St. Vrain.[4]

The State of Idaho filed a Petition for Review in the Ninth Circuit Court of Appeals, claiming that the De-

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fuel from Fort St. Vrain. It states that "[t]he Idaho National Engineering Laboratory . . . rests over the Snake River Aquifer, the primary source of Idaho's drinking water, and radioactive contaminants have already been measured in the groundwater below its surface." Pet. 11. Whether this statement is true or not is irrelevant to this case since no allegation has ever been made that the Fort St. Vrain fuel which has been stored at the Irradiated Fuel Storage Facility is either leaking or is the radioactive contaminant to which Idaho refers. There has never been any allegation that the fuel which is being stored in the Irradiated Fuel Storage Facility constitutes an actual threat to the health or safety of the people of Idaho.

[4] In its Petition, Idaho refers to a decision made by the Department of Energy in February 1991 to store 300 tons of civilian spent fuel at the INEL. Pet. 4-5. This is a mischaracterization of the situation. The decisiton for DOE to store the Fort St. Vrain spent nuclear fuel was made in 1965. The decision to store the spent nuclear fuel at the Irradiated Fuel Storage Facility in Idaho was made when that facility was built in 1975. This decision to store the fuel at the Irradiated Fuel Storage Facility was not made, as is implied by Idaho, in February 1991 when DOE informed Public Service that its facilities were ready to receive the remainder of the fuel.

partment of Energy had violated the Nuclear Waste Policy Act.[5] On September 20, 1991, ten days after oral argument, the Court of Appeals issued its decision dismissing Idaho's Petition for Review on the ground that the Nuclear Waste Policy Act did not apply to the Public Service Company/Department of Energy contract which was entered into prior to the effective date of the statute. Pet. App. 1-11. Idaho filed a Petition for Rehearing and Rehearing *En Banc*. On December 13, 1991, the Panel amended its decision and denied rehearing. The rehearing *en banc* was also denied. *Id.*

The Ninth Circuit determined that the language of the Nuclear Waste Policy Act was prospective in nature and did not apply to the pre-existing agreement between Public Service Company and the Department of Energy which had been previously authorized by Congress in Public Law 89-32, 79 Stat. 120. 122. Pet. App. 7. After the Court determined that the Nuclear Waste Policy Act did not apply to the existing Public Service Company/DOE agreement, the Court further determined that it did not have pendent jurisdiction to consider Idaho's claim under the National Environmental Policy Act.[6] Pet. App. 11.

DISCUSSION

I. THE DECISION IN THIS CASE IS NOT LIKELY TO HAVE PROSPECTIVE EFFECTS.

Idaho contends that the Court of Appeals decisions should be reviewed because it involves a question of recurring importance. Pet. 8. Idaho does not assert that this decision is in conflict with a decision of another United States Court of Appeals decision on the same matter or has so far departed from the accepted and usual course

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[5] Since Public Service had an important interest in this matter concerning its spent nuclear fuel, the Ninth Circuit granted Public Service's motion to intervene.

[6] Idaho does not challenge the dismissal of its pendent National Environmental Policy Act claim here.

of judicial proceedings as to call for an exercise of this Court's power of supervision. This case is limited solely to its facts and the possibility of its recurring is not suggested by Idaho, nor is it likely.

This case involves the situation where the Department of Energy has entered into a contract pursuant to prior statutory authority to purchase and store spent nuclear fuel. The effective date of the Nuclear Waste Policy Act is January 7, 1983. Idaho has not cited, nor are we aware of, any other agreements which predate the effective date of the Nuclear Waste Policy Act which either are or may be subject to similar judicial review on this issue.

Idaho ignores this situation by focusing on a scenario in which someday the Department of Energy may agree to take possession of some utility's spent fuel. Central to Idaho's position that this issue may recur is its statement that "[a]s the concerns over how to store spent nuclear fuel in the interim mount, the Department of Energy will be under increasing pressure to resolve the problem for the private utilities." Pet. 9. The concern of Idaho, therefore, is its speculation as to what problem may confront this country in the future. If Idaho is correct, which is not at all certain, the resolution of the problem may be legislative. If the matter Idaho envisions would be brought to litigation, the issue would be whether the Nuclear Waste Policy Act applies to contracts entered into by the DOE after the Secretary's authority under 42 U.S.C. § 10156(a) expired in 1990. Supreme Court review of the retroactivity of the Nuclear Waste Policy Act would not be an aid to resolve the speculative situation which Idaho poses. Further litigation involving the retroactivity of the Nuclear Waste Policy Act to pre-Act DOE contracts is not likely.

II. EVEN IF THE DECISION ADDRESSED A MATTER OF UNIVERSAL CONCERN, THE COURT BELOW IS CLEARLY CORRECT.

The Appellate Court examined the clear language of the Nuclear Waste Policy Act and found that it was written in terms of prospective application. Pet. App. 7. There is plainly nothing in the language of the Act or its legislative history which would imply that the Act's provisions could reach back to a contract which at the time of the effective date of the Nuclear Waste Policy Act was 17 years old, nor is there any indication that the Act intended to repeal the prior congressional act which authorized the construction of the Fort St. Vrain plant.

Not only is the specific language of the statute consistent with the lack of retroactivity, but the Appellate Court's decision is consistent with the well established rule that "retroactivity is not favored in the law," and accordingly, "Congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988); Accord, *Bennett v. New Jersey*, 470 U.S. 632, 639 (1985).

This presumption of law, as well as the plain reading of the Act's provisions, show that Congress did not intend to affect the rights of those operating under existing contracts. This clearly makes sense. What Idaho seeks to do is to void only the storage portion of the research and development contract which Public Service and DOE, the parties to the contract, are willing to implement. Idaho attempts to do this after the Fort St. Vrain plant has been built and after the Irradiated Fuel Storage Facility, the facility specifically designed for the spent fuel, has been completed. Public Service has completed its part of the bargain and Idaho, at this late date, now seeks to prevent the Department of Energy from accomplishing its part. If Public Service is unable to ship the spent nuclear fuel to Idaho pursuant to the agreements made so

long ago, who would be so foolish as to enter into any long term agreement with the government? [7]

Idaho's discussion concerning the National Environmental Policy Act (Pet. 13-16) is irrelevant. Idaho has not challenged the Ninth Circuit's dismissal of its pendent National Environmental Policy Act claim, and indeed, Idaho continues to press that claim before the U.S. District Court in Idaho (Civil Action No. 91-0054 S HLR).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DAVID W. KERBER *
KELLY, STANSFIELD & O'DONNELL
1225 17th Street, Suite 2600
Denver, CO 80202-5591
(303) 295-2500

JAMES R. MCCOTTER
General Counsel
PUBLIC SERVICE COMPANY
OF COLORADO
P.O. Box 840
Denver, CO 80201-0840
(303) 294-8500

Attorneys for Intervenor,
Public Service Company
of Colorado

Date: April 15, 1992

* Counsel of Record

[7] In *Florida Power and Light v. Westinghouse Electric Corp.*, 826 F.2d 239, 246-247 (4th Cir. 1987), the Fourth Circuit observed that without the promise by the government that resolved the spent fuel issue by agreeing to reprocess or make financial arrangements, it would have been highly unlikely that any utility would have been willing to accept the financial hazard of constructing an expensive nuclear power plant.